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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 667

MORRIS V. BENATAR and BENATARS (a corporation),
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Morris V. Benatar and Benatars, a corporation, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States

District Court for the Northern District of California (Chief Judge Denman dissenting) respectfully shows:

OPINIONS BELOW.

The District Court wrote no opinion.

The affirming opinion (R. 462) of the Court of Appeals and the dissenting opinion of Judge Denman (R. 481) are not yet reported.

JURISDICTIONAL STATEMENT.

The decision and judgment of the Court of Appeals was entered on January 6, 1954. (R. 485.) An order denying a rehearing and staying mandate was entered on February 3, 1954. (R. 485.) On March 4, 1954, Mr. Justice Douglas of the Supreme Court made an order extending, to April 3, 1954, the time within which petitioners could file in the above Court their petition for said writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE AND THE MATTERS INVOLVED.

Petitioners and one Samuel W. Potter were indicted (R. 1) and convicted of conspiracy (18 U.S.C. sec. 371).

Named in the indictment as a co-conspirator, but not as a defendant, was one Edwin M. Furtado, an employee of the office of Collector of Internal Revenue and Chief of the Accounts Section, Wage and Excise Tax Division. (Furtado was the chief witness for the Government.)

The indictment set forth the object of the conspiracy as follows (R. 3):

> "By the defendants, Morris V. Benatar and Samuel W. Potter, filing withholding and employment tax returns for and on behalf of the corporate defendant, Benatars, on or before the date upon which said returns were due to be filed, without the payment of the taxes payable thereon; by the payment of said withholding and employment taxes by the defendants, Morris V. Benatar and Samuel W. Potter, for and on behalf of the said corporate defendant, Benatars, at a time when penalties and interest, required by Title 26, Section 3655(b) U.S.C.A. were required to be added to the taxes so due and collected; and by acceptance by the said Edwin M. Furtado in his official capacity as hereinbefore set forth in paragraph (4), of said payment of taxes so due upon the withholding and employment tax returns without the payment or addition of accrued penalties and interest as required by Title 26, Section 3655(b), U.S.C.A., and without making demand and causing demand to be made, as required by law, of payment of said penalties and interest; thereby to deprive the United States of penalties and interest in the amount of $6,000.00."

The indictment sets forth 14 overt acts running from July, 1949 to April, 1951. (R. 3.) In the main, these

overt acts charged the filing of the quarterly returns on time and the payments of the amounts due at a much later date when penalties and interest had accrued but were not paid.

Benatars, a California corporation, was almost wholly owned by Morris V. Benatar, it operated two retail drug and sundry stores in San Francisco. Samuel W. Potter was an employee of the corporation and general manager thereof.

Neither Morris Benatar nor Samuel Potter testified at their trial.

The government's case rested almost entirely on the testimony of Edwin Furtado (the Internal Revenue agent named as a co-conspirator but not as a defendant in the indictment). Furtado's testimony, as stated by Judge Denman in his dissent (R. 483), consisted of *"over 100 pages of his description of Potter's acts and statements in Benatar's absence showing the existence of the conspiracy."* (Italics ours.) There was also the testimony of Leo Schmitz as to acts and declarations of Potter out of the presence of Benatar.

The government's theory was that the corporation would file a quarterly return on time and, at a much later date, Potter would deliver to Furtado a check for the tax due; that Furtado would hold the check until Potter told him to deposit it, whereupon Furtado would back date the receipt of the check and alter the government's books so as to show the payment at a time when no penalty or interest would attach.

The government first introduced the corporate quarterly withholding and social security tax returns for 1947, 1948, 1949 and 1950; then various records and books of the Internal Revenue Department were received in evidence.

There was received in evidence, over defendant's objections, a corporate claim for abatement of penalties and interest dated Nov. 22, 1948 and attached documents. (U.S. Ex. 10; R. 41.)

The questions raised herein are primarily based on the testimony of Edwin Furtado and Leo Schmitz narrating acts done and statements made by Samuel Potter out of the presence of Morris Benatar and without any testimony connecting Benatar therewith. We here set forth the substance of the testimony of these two witnesses so far as pertinent to the points involved.

EDWIN MELVIN FURTADO testified as follows:[1]

I am serving a sentence in the Federal Prison. I pleaded guilty on the first four counts of the indictment. I believe they were for falsifying Government records and for destroying assessment sheets in the Internal Revenue Office.

I know David Mooney, Morris V. Benatar and Samuel Potter. I met Potter in 1948 (R. 271), about the month of August and I met Mr. Benatar a few weeks later. Dave Mooney introduced me to Mr. Potter and Mr. Benatar. (R. 271.) I first *met Mr. Potter* in the restaurant at

[1]Furtado testified that he met Morris Benatar in August, 1948. Not once in his testimony does he state having any contact with Morris Benatar, direct or indirect, until August 14, 1951.

1155 Market Street and there was a conversation about a tax matter. *Mr. Benatar was not present.* The conversation was that I knew that particular type of tax could be abated if the taxpayer had filed for an extension of time with the Collector's office. (R. 273.) I made up this claim which is part of Exhibit No. 10. *I told Mr. Potter that if I could have a letter dated prior to January 30th, I could put that in the file and then when I made this claim,* the claim would then be accepted by the Bureau. (R. 274.) *This talk with Mr. Potter* was some time in September, 1948. The letter you show me on Benatar's stationery dated January 28, 1947 was *given to me by Mr. Potter* and I put it in the file.[2] I received this letter in September or October, 1948. I put the letter in the files before the claim was prepared. I prepared the claim some time in November, 1948. I didn't confer with anyone in Benatars concerning that claim. Some time before November 10, 1948 I presented the claim at Benatars to be signed and *must have given it to Mr. Potter.* (R. 277.) *I told Mr. Potter* that if this claim was signed and notarized, it would be a good claim and accepted by the Bureau. (R. 277.)

The Return for the quarter ending March 31, 1949 was filed some time in May. (R. 285.) I received the Return out of the basket upstairs in the Examiner's Office, the Return had been mailed. (R. 288.) I stamped it April 28, 1949, "Received with remittance" but there was no remittance. (R. 289.) Then I gave the Return to Mrs. Grady to mark off of the master list so that the tax-

[2]Letter admitted as U.S. Ex. 50, over Morris Benatar's objection that no foundation had been laid as there was no showing he had anything to do with it. The letter was not signed by Benatar.

payer would not receive a delinquent notice. (R. 290.) I received the check for the March 31, 1949 Returns some time in August, 1949 (R. 291) *from Mr. Potter.* It did not include any interest or penalty. I then went to the Benatar file and attached the check to both Returns, went to the cashier's office and put in a block of other returns with checks. The Returns were already stamped as having been paid April 29, 1949 with the cashier's stamp. When the Returns reached the accounting section they were marked fully and timely paid. (R. 292.)

Exhibit No. 8 is the social security tax return for the quarter ending March 31, 1949. That was likewise stamped by me as received with remittance on April 28th. This was some time in May. (R. 292.)

Exhibit No. 27, a check dated April 30, 1949 for $8735.75 is the check *I got from Mr. Potter* and put through some time in August. (R. 292.)

The withholding tax return for the quarter ending June 30, 1949 (Exhibit No. 3) shows it was timely filed, and the correct amount of interest assessed in the books. (R. 293.) I put a memorandum in the account "hold billing; money in office". I put this memorandum in light pencil on our Form 23a. The money was not in the office. (R. 294.) This Return had been timely filed without remittance. (R. 295.) Some time in September or October I got the payment for the taxes and interest for the quarter ending June 30, 1949 *from Mr. Potter* in the form of a check. (R. 297.) That check is Exhibit No. 28 and is dated September 30, 1949 which is the date I received it. I put that check under my desk blotter and I kept it until such time as Benatars

Corporation had enough money in the bank to clear it. *I would find that out by calling Mr. Potter, not Mr. Benatar, to find out whether I should put the check through.* I put the check through some time in November. Before doing so *I talked to Mr. Potter.* (R. 298.)

For the quarter ending September 30, 1949, I received the check, Exhibit No. 29 dated December 8, 1949, No. 12269 for $8409.54 some time in December *from Mr. Potter.* (R. 304.) I kept the check in my desk about a month and then deposited it in the cashier's office with the Form 17 (R. 304) some time in January. I believe I had a conversation with someone at Benatars before I deposited the check; *it was with Mr. Potter.* (R. 305.) No one else was present. *I asked Mr. Potter if they had enough money in the bank and he said it was all right* so I took the statement of tax due and the check and deposited it in the cashier's office. (R. 306.)

For the quarter ending March 31, 1950, I received the the check, Exhibit No. 30, in the sum of $10,042 in the latter part of March or first part of April, 1950 *from Mr. Potter.* (R. 307.) I kept the check in my desk about a month. I occasionally asked whether I should put the check through and *he said he would let me know.* I attached the check to the first demand notice and deposited it in the cashier's office some time in May. (R. 308.)

For the quarter ending March 31, 1950, I received the check for this period, Exhibit No. 31, some time in August and a smaller check for $65.98, Exhibit No. 37, at the same time *from Mr. Potter.* The first check was for $8797.99 which covered the withholding tax and

old age benefit tax. It did not include any interest or penalty. (R. 310.) The assessment sheet shows 15 days' interest on both of these items amounting to $65.98. I stamped the 17W as received with remittance on April 29, 1950. This was some time in August. (R. 310.) Some time in June, 1950 *I had a conversation with Mr. Potter and told me a check was already drawn for $8797.99* but that check was torn up and destroyed. This was for the tax due in April. (R. 311.)

For the quarter ending June 30, 1950, I received the check, Exhibit 32, some time in October *from Mr. Potter* and held it until some time in December, 1950, attached it to the Form 17 and deposited it in the cashier's office. (R. 312.)

For the quarter ending September 30, 1950, I received the check, Exhibit No. 33, for $13,024.80 numbered 1371 *from Mr. Potter.* (R. 314.) I held up the check until such time as *Mr. Potter* told me they had enough money in bank to cover it. (R. 314.)

I had something to do with the tax account of the Benatar Corporation for the quarter ending December 31, 1950. A Form 17 went out on February 1, 1951 and a Form 21 was sent to Benatars on February 28, 1951 and a 69, the warrant of distraint, was issued and put on my desk on March 20, 1951 at my request. (R. 315.) *I gave the warrant letter and the Form 17 to Mr. Potter.* (R. 315.) *When I gave these documents to Mr. Potter* I pointed out how much interest I was saving him by this method. (R. 317.) I received a check for the taxes for the quarter ending December 31, 1950 in the latter part of March, 1951. Exhibit No. 49 which is a copy

of or voucher of check No. 2677 dated February 11, 1951 for $14,335.29 is a copy of the check I received. *I received it from Mr. Potter.* I put the check on my desk and underneath the blotter. (R. 317.) In April I was able to locate another account for approximately the same amount of money so *I took the check back to Mr. Potter and gave it to him, told him I didn't need it, he could destroy it as far as I was concerned.* He could take his time making this payment. As a matter of fact he might never have to pay it. (R. 317.)

I found on our record 23e which lists the identification numbers and amounts that were fully paid timely with the filing of the Return, that the tax liability for the Calo Dog Food account was $14,334.17 while the Benatar liability for this same quarter was $14,335.29.[3] (R. 322.) I drew a line through the number 13423 and wrote in 6457, the master list number of Benatar's Corporation for the quarter ending December 31, 1950. *Later on I gave to Mr. Potter the No. 2-154561 in his office in April,* 1951. (R. 323.) *I told him* to telephone me some time at the Collector's Office and give me this number back again over the telephone which he did some time in April. (R. 324.) *When he telephoned* I called over the Chief of the Billing Section and asked her to find or follow up the 17 and write the number 2-154561 across the 17. This latter number stands for the fully paid list on our 23e, a fully paid Return. The master list was changed to read Benatar's Corporation. (R. 324.) That number was the

[3]Objection was made to the introduction in evidence of anything relating to the Calo Dog Food transaction on the grounds it was not within the conspiracy charged and not in the nature of a similar offense.

Calo Dog Food number. I told the billing clerk to go to this Form 23e and write in there "apparent duplication, see 2-154561", that would make the account fully paid that they paid twice. (R. 325.) *I asked Mr. Potter if he would make me up an identical copy of the Schedule "A"*, that is the employee's identification number and the amount of wages paid for this quarter. *Potter said he would* and then I went over to Tenth Street, that is the addressograph plate room. I had them prepare several of these Benatar Corporations with the address, master list, and so on. (R. 326.) I had everything put on the addressograph plate except the quarter and the master list number, then I typed in the quarter December 31, 1950, 6457 and the initials KN of the person who should have done it. (R. 326.) Exhibit 23 is the form that I had especially prepared. *I gave this form to Mr. Potter* and asked him to fill in the various amounts. The lower portion of the line 941, to put in the social security numbers, the names and amounts earned by the employees for the term ending December 31, 1950, that is the Schedule A. (R. 327.) That was done. I had some more of these forms in the office and I put in the pencil memorandum showing the same tax, withholding taxes as on the original, the same wages paid, then took off $1.14 for fractions, made a return, this is in pencil, total tax due of $14,334.17 to agree with the amount that the Calo Dog Food Co. paid. (R. 328.) *I took this form with these pencil figures over to Mr. Potter* in Benatar's office. *He pencilled the figures in this form here,* Exhibit No. 23 and then somebody typed in the figures over the pencil mark. (R. 328.) This was in the latter part of May or some time

in June. *I gave these pencil forms to Mr. Potter.* (R. 329.) *Mr. Potter put the figures in pencil,* then someone typed these figures in this particular form and *Mr. Potter and I went down to see Mr. Batlin who signed the Return.* I took the completed Return to the Collector's Office. As Benatars had filed the Return for the quarter ending December 30, 1950 in time this would make two Schedule A's going back to the Board. The Social Security Board would then notify the Collector's Office that there were two Schedule A's. The files would be checked and a letter sent to Benatars Corporation saying that they had credit for $14,334.17 and credit could be applied against this account. *I told Mr. Potter* not to worry about the account, for all purposes it was paid. On August 1st the supervisor checked in the file. I went over to Benatars and spoke to Mr. Benatar and Mr. Potter and asked for a check for the tax for the amount of tax of $14,335.29. I talked to Mr. Potter and Mr. Benatar. (R. 330-1.) I told him had to issue a warrant in this particular account and said if I had a letter from them stating the original check was misplaced, that the original was sent to the office but never cleared our file, that I could so set up the books that the amount of penalty and interest of $1190.41 could either be refunded to them or credited. I told them what I would like to have in the letter. The letter, Government's Exhibit 22, I saw in Mr. Benatar's office on August 14, 1951. (R. 332.) On August 14th I went to see Mr. Benatar as I wanted to make sure this letter was filed.

Exhibit No. 23 is the second original Return signed by Philip Batlin. When I got ready to take my vacation I took this Return and other Returns and put them in a

large manila envelope and *gave it to Mr. Potter* to keep in Benatar's files. When my attorney decided I was going to plead guilty on these other grounds, we also decided to give the Government back all the records, all the Returns which I had pulled out of the files. This envelope was picked up at Benatars, given to my attorney and he gave me all the Returns back and I gave them to the Government agents. (R. 335.)

On August 14th I was with Mr. Benatar in his office, no one else was present. I had a conversation with him. (R. 336.) I asked Mr. Benatar to be sure and stop payment on that check and attach that letter which he showed me, the letter you showed me a while ago, Exhibit No. 22. I said to all appearances the letter looked all right but to be sure to attach the letter to if and mail it to the office before the 31st of August and then when I was leaving I told him: "The books are so situated now that we can get a refund of $14,335." I said around $15,000. Benatar kind of smiled and said: "If you get that I will give you half of it." I didn't say anything and he said: "I will give you two-thirds of it." Nothing further was said. (R. 337.)

I saw Mr. Potter after I returned from my vacation on September 17th. On September 16th the Clerk at the office called me and told me they had discovered some particular discrepancy in the Benatar account; that is *why I saw Potter that Monday morning.* (R. 338.) *I told Potter about this incident;* that everything was not done the way I wanted it; that Benatar didn't stop payenmt on his check and that is how they got this error. Potter advised me to get an attorney. (R. 338.)

I received the nine checks that are Exhibit No. 40. (R. 342.) One of those checks was from John Cosmos and others from Mrs. Esther Pucci. I received them all from Mrs. Pucci. Some are payable to cash and some are made payable to me. (R. 342.) I cashed these checks at Benatars Drug Co. *I gave them to Mr. Potter for cashing.* (R. 344.)

Potter and I rented a safe deposit box and we had it until I got sentenced. Mr. Schmitz had my key to the safe deposit Box. (R. 350.)

I manipulated the tax liabilities of other taxpayers. There were several. I don't know exactly. In each of these other instances as far as I was concerned, the taxpayer didn't know what I was doing. I manipulated accounts like I did Mrs. Pucci and Banovich and so forth in order to embezzle money from the Collector's Office. I did that without their knowledge and for my own benefit. (R. 352.) In these several other instances I held up the checks of these taxpayers and kept them under my blotter as I did the Benatars checks. I did this innumerable times, and for the purpose of embezzling some of these funds I would make alterations in the books of the Revenue Office. (R. 353.)

I made a confession to Mr. Carlson. (R. 355.) *I sent Mr. Potter a copy of my confession* of fasifying the assessment sheet where I changed Calo Dog Food to read Mr. Benatar's number. (R. 356.)

With reference to the number that *I told Mr. Potter* to telephone in to me relative to the Calo Dog Food transaction, that number is merely a record for the Col-

lector's Office that the account has been paid. The taxpayer never gets a duplicate of that number unless he has a cancelled check or a depositary receipt on which the same number would appear. *I had Mr. Potter* telephone that number in so that I could have a bill and warrant clerk pick up the number from the outside and go to the assessment list and write "apparent duplicate" and put the block number on it. (R. 362.) Then I got the idea that we could get a refund if he would make up a duplicate assessment for the quarter ending December 31, 1950. I got the idea that I could get a refund or have the tax set aside as being a fully paid Return. (R. 363.) I tore up the Calo Dog Food Return so there wouldn't be any Return from the Calo Dog Food people. (R. 366.) My idea was that there being no immediately available record showing any payment by the Calo Dog Food people that by transferring that payment by number to the Benatar account, I would accomplish one of two results: I would either have it go through as that account having been paid when in fact it was not paid, or if there were a second assessment somewhere along the line I could have that second one abated. (R. 367.)

Leo Schmitz, testified in part as follows:

I know Edwin Furtado. He was in the office of Benatars many times during the years 1949, 1950 and 1951. In 1951 he was there almost every day. Furtado cashed checks at Benatars. The checks you show me I have seen before. (Group of 9 checks marked Government's Exhibit 40.) (R. 161.) *Those checks were handed to me by Mr. Potter* to be cashed in the office of Benatars. The checks

bear different dates and were cashed at different times. When the checks were cashed there was present the cashier, myself, Mr. Potter and maybe Furtado. *I would give the money to Mr. Potter.* (R. 162.)

At various times Mr. Furtado left money at Benatars. Sometimes *he gave an envelope to Mr. Potter* and it was placed in the safe. Sometimes he would leave money in the cash booth to be left in an envelope and he would take it out at various times. (R. 164.)

In May of 1951 he left $2500 and it was deposited with the corporation's funds. (R. 167.) Relative to this $2500, there was a check drawn for $2100 to cash and that money was delivered to Mr. Furtado in May of 1951. (R. 167.) I do not recall that Mr. Benatar ever gave me any instructions regarding any money Mr. Furtado left at Benatars. (R. 169.) *At the orders of Mr. Potter* I put $380 in the safe and later Mr. Potter and I took it out and it was delivered to Mr. Furtado's sister on an order from Furtado. (R. 170.)

The District Court refused to instruct the jury as requested in their Requested Instruction No. 12, reading as follows:

> "In determining whether or not a conspiracy existed as charged in the indictment and that the defendant Morris Benatar was a member of such conspiracy, you are instructed that you cannot take into consideration and must disregard and put out of your mind any and all testimony and evidence relating to any acts done or declarations made by any other alleged co-conspirator out of the presence of the defendant Morris Benatar and which acts *or* declara-

tions were not authorized by Morris Benatar. In other words, so far as the defendant Morris Benatar is concerned, the existence of the conspiracy charged in the indictment and his connection therewith as a member must be established by evidence independent of the acts and declarations of any other alleged co-conspirator done or made out of the presence of Morris Benatar and which were not authorized by the said Morris Benatar." (R. 9.)

To the refusal to give such instruction Morris Benatar objected as follows:

"Now, I would like to note an exception on behalf of each of the defendants for the failure of the Court to give defendants' Instruction No. 13—No. 12 first, which is to the effect that the guilt of Morris Benatar could not be established—that the existence of the conspiracy charged so far as Morris Benatar was concerned and his connection therewith could not be established by the act and declarations of any other alleged co-conspirator in the case." (R. 460.)

The government introduced in evidence (only against Morris Benatar) a 50 page statement of Morris Benatar given to government agents on January 8, 1952. (U.S. Ex. 54; R. 393.) At the conclusion of the case the trial Court, on its own motion, instructed the jury as follows:

"Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them. On the other hand, after a conspiracy has

come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements.

"In this regard I call your attention to one piece of evidence that has been admitted here which is limited entirely to the defendant Benatar, and that is the statement which is in evidence. Now, under any consideration of the evidence that statement was made after the conspiracy had terminated, and I have, at the time it was admitted, I specifically limited it to the defendant Benatar, and that is precisely what the language I have just read to you means. It means that statements such as that made after the conspiracy, statements made after the conspiracy is ended or declarations made after the conspiracy is ended can be considered against only the person making them and not other members of the conspiracy." (R. 453-4.)

To the giving of the foregoing instruction each appellant duly objected and excepted. (R. 460.)

Proceedings in the Court of Appeals. The Court of Appeals, in an opinion written by District Judge Lemmon sitting pro tem., upheld the judgment against petitioner. Chief Judge Denman dissented. The majority opinion holds in substance and effect as follows: (a) That testimony as to the extrajudicial acts and declarations of a co-conspirator is competent evidence against a man on trial even though there be no independent proof of the conspiracy and the defendant's connection therewith, save

and except such testimony that establishes the defendant's connection with the conspiracy; (b) The law providing that testimony as to the extrajudicial acts and statements of a co-defendant is not competent evidence against a man on trial in the absence of proof *aliunde* of the conspiracy charged and defendant's connection therewith is not such a fundamental, basic or essential element of the law of criminal conspiracy requiring the trial judge to instruct the jury thereon with or without a request so to do; (c) That in a trial for criminal conspiracy it is proper for the judge to instruct the jury that certain evidence had been admitted against defendant because the conspiracy had been established; (d) That the failure of the Court to instruct the jury, that the conspiracy charged and defendant's connection therewith could not be established by testimony as to the extrajudicial acts and declarations of a co-conspirator, is not a plain error affecting the substantial rights of the defendant to be noted by the Appellate Court under Rule 52(b), Federal Rules of Criminal Procedure.

That the majority opinion, as made manifest by a reading thereof, first spells the guilt of the defendants out of the dead record and then affirms the convictions by ignoring and avoiding plain errors that affected the substantial rights of the defendants.

QUESTIONS PRESENTED.

1. Is it not a basic rule of law of criminal conspiracy that, as against the defendant on trial, neither the con-

spiracy charged nor the defendant's connection therewith can be established by testimony as to the extrajudicial acts and declarations of an alleged co-conspirator said and done out of the presence of the defendant?

2. Is it not the duty of the trial judge to instruct the jury on all essential questions of law involved in the case, with or without a request by defendant?

3. In a trial for criminal conspiracy, where defendant requests the Court to instruct the jury that, as to him, the conspiracy charged and his connection therewith cannot be established by testimony of the acts and declarations of an alleged co-conspirator (where the case against him in the main consists of such testimony), is it not reversible error for the Court to refuse to give such requested instruction or any other instruction on the same basic rule of law and evidence?

4. Is it not stretching the law of criminal conspiracy beyond all limits for an Appellate Court to hold that hearsay testimony as to the acts and statements of an alleged co-conspirator, except those statements directly connecting the man on trial with the conspiracy charged, is competent evidence to establish the conspiracy and the defendant's connection therewith?

5. Where the Court refuses to instruct the jury as to the law as set forth in 1 and 3 above, does not such refusal constitute plain error affecting the substantial rights of defendant that must be considered by the Appellate Court under Rule 52(b), Federal Rules of Criminal Procedure, especially where an imperfect objection was made to such refusal of the trial Court?

6. Where a requested instruction, refused by the trial Court, correctly states the law and its applicability to the case at bar, is it not a sufficient objection under Rule 30, Federal Rules of Criminal Procedure, to call the Court's attention to the instruction and the rule of law contained therein?

7. In trial for criminal conspiracy, is it not error for the Court to instruct the jury that a certain document had been admitted in evidence against the defendant because the conspiracy charged had been established?

8. Is it not error for the Court of Appeals to first spell guilt out of the dead record and then affirm the conviction by ignoring and avoiding plain errors in the record that affected the substantial rights of the defendant on trial?

9. Is it not the function of the appellate judges to determine whether a defendant's guilt had been ascertained by a jury under appropriate judicial guidance according to the standards fixed by law; rather than to substitute their belief in the guilt of the accused and so affirm his conviction by ignoring plain errors that affected the defendant's substantial rights?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners submit, as hereinafter amplified, that the decision rendered by a majority of the judges of the Court of Appeals for the Ninth Circuit (a) in several particulars is in conflict with prior decisions of this Court and

other federal Courts of appeal, and (b) has departed from and sanctioned the District Court in so departing from the usual and accepted course of judicial proceedings, as to call for this Court's power of supervision.

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1. **THE MAJORITY OPINION IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEAL STATING THE LAW RELATING TO THE ADMISSIBILITY AND PROBATIVE EFFECT OF TESTIMONY AS TO THE ACTS AND DECLARATIONS OF A CO-CONSPIRATOR.**

The long established law of conspiracy is that testimony as to the *extrajudicial acts and declarations* of an alleged co-conspirator is not competent evidence against a man on trial to establish either the conspiracy charged or the defendant's connection therewith. In *Hitchman Coal Co. v. Mitchell,* 245 U.S. 229, 249, 62 L. ed. 260, 275, this Court states:

> "In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, * * *"

To same effect: *Winchester, etc. Manufacturing Co. v. Creary,* 116 U.S. 161, 166, 29 L. ed. 591, 592; *Glasser v. United States,* 315 U.S. 60, 74, 86 L. ed. 680, 701.

Every other Federal Court of Appeals has followed the rule that the criminal conspiracy charged and the defendant's connection therewith must be established by proof *aliunde* the testimony of a witness as to *acts and declarations* of an alleged co-conspirator. We cite a few

such cases: *Bartlett v. United States* (10 Cir.) 166 F. 2d 920, 924; *Minker v. United States* (3 Cir.) 85 F. 2d 425, 427; *Briggs v. United States* (10 Cir.) 176 F. 2d 317, 320; *Braatelien v. United States* (8 Cir.) 147 F. 2d 888, 893; *United States v. Renda* (2 Cir.) 56 F. 2d 601.

In the case at bar, the decision of the majority announces a rule in direct conflict with the foregoing cases. Defendants Requested Instruction No. 12 contains a correct statement of the law as announced in the foregoing cases.[4] In holding that the objection to the refusal to so instruct the jury was "abortive" the decision states:

> "He (Benatar's counsel) should have pointed out, if he could, that there was evidence in the record consisting of statements by Benatar's alleged co-conspirators to the effect that Benatar was a member of the conspiracy, which statements were being relied upon by the appellee to *establish* Benatar's connection with the conspiracy. • • •
>
> In other words, none of the co-conspirators were quoted as having made *extrajudicial* statements connecting Benatar with the conspiracy." (Court's Italics.) (R. 477.)

Thus, the Appellate Court decision emasculates the rule announced in the foregoing cases; it holds that all testimony as to extrajudicial acts and statements of a co-conspirator are admissible against a defendant to prove the conspiracy and defendant's connection therewith, save and except those statements which connect the defendant with the conspiracy.

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[4]Requested Instruction No. 12 is set forth in full supra p. 16; also in Judge Denman's dissenting opinion (R. 481, footnote 4).

The decision has put the cart before the horse. The admission of testimony of such extrajudicial acts and declarations is based upon the law of agency and is inadmissible until such agency has been established. (*United States v. Renda* (2 Cir.) 56 F. 2d 601.)

Testimony as to the acts and declarations of a co-conspirator said or done out of the presence of a defendant is hearsay (*Krulewitch v. United States,* 336 U.S. 440, 443, 93 L. ed. 790, 794), and no such hearsay testimony, whether or not it connects defendant with the conspiracy, has any probative value until the foundation has been laid with independent evidence establishing the conspiracy and defendant's connection therewith. The decision herein violates this important rule and is in conflict with all other decisions on the subject.

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2. THE MAJORITY OPINION IS IN CONFLICT WITH ALL PRIOR DECISIONS IN HOLDING THAT THE LAW ANNOUNCED IN DEFENDANT'S REQUESTED INSTRUCTION NO. 12 WAS NOT A FUNDAMENTAL, BASIC AND ESSENTIAL ELEMENT OF THE LAW OF CRIMINAL CONSPIRACY AND THAT THE TRIAL JUDGE DID NOT HAVE TO GIVE ANY SUCH INSTRUCTION.

In refusing to consider the error of the trial Court in refusing to instruct the jury as requested in said Instruction No. 12, (to the effect that neither the conspiracy charged nor defendant's connection therewith could be established by testimony as to the extrajudicial acts and declarations of a co-conspirator) the majority opinion states that such rule of law and evidence did not

constitute such a "fundamental" instruction that had to be given by the Court regardless of a proper request or objection.

Every case which we have heretofore cited holds that the law as embodied in the requested instruction is a fundamental and basic rule of the law of criminal conspiracy.

The majority opinion admits that a "fundamental" instruction must be given by the Court to the jury (R. 477). The law is that it is the duty of the trial Court in a criminal case to instruct on all "essential questions of law involved". (See cases cited to such effect in the dissenting opinion of Judge Denman herein (R. 484), including the case of *Screws v. United States,* 325 U.S. 91, 107, hereafter quoted.)

That such instruction is basic and fundamental is easily demonstrated. In *Kruelwitch v. United States,* 336 U.S. 440, 443, this Court has held that testimony as to the extrajudicial acts, etc., of a co-conspirator constitutes an exception to the hearsay rule. Such exception, as pointed out above, only has probative value when there is independent proof of the conspiracy and the defendant's connection therewith. If the Court were not required to instruct the jury that such hearsay testimony cannot be used to establish the conspiracy or defendant's connection therewith, then men charged with such crime could be convicted on unsupported hearsay testimony and, as said by this Court in *Glasser v. United States, supra,* P. 74, "hearsay would lift itself by its own boot straps to the level of competent evidence".

So, in the case at bar, as in all other cases of criminal conspiracy, the failure of a Court to instruct the jury that there must be independent proof establishing the conspiracy and defendant's connection therewith beyond testimony of the extrajudicial acts and declarations of a co-conspirator, permitted the jury to find defendant guilty upon incompetent and hearsay evidence.

The majority opinion lays down a rule at total variance with all other cases on the subject. It establishes a course of conduct in all future trials of conspiracy whereby juries will be permitted to consider and find defendants guilty on unsupported hearsay testimony. It constitutes and sanctions such a departure from the usual and accepted course of judicial proceedings as to call for this Court's power of supervision.

It was the duty of the trial Court to instruct on all essential questions of law involved in the case. The failure of the Court to so instruct as requested on so vital a matter demands a reversal of the conviction. In *Bollenbach v. United States*, 326 U.S. 607, 613, 90 L. ed. 350, 354, it is stated: "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." Failure to instruct at all on a basic issue is just as prejudicial as the giving of an equivocal instruction on such issue. Cf. *Screws v. United States*, 325 U.S. 91, 107, 89 L. ed. 1495, 1506, where this Court holds that it is a fundamental error not to submit to the jury the essential ingredients of the offense charged. In the *Bollenbach case, supra*, (326 U.S. 607, 612), this Court states that "Discharge of the jury's responsibility for drawing appropriate con-

clusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Here, the trial judge refused to give the jury any statement of the "relevant legal criteria" by which it could be guided in considering the sufficiency of the evidence to establish the conspiracy charged and defendant's connection therewith, and the Court of Appeals has sanctioned such procedure.

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3. THE MAJORITY OPINION IS IN CONFLICT WITH ALL PRIOR DECISIONS IN REFUSING TO CONSIDER THE ERROR RESULTING FROM THE FAILURE TO INSTRUCT AS SET FORTH IN DEFENDANT'S REQUESTED INSTRUCTION NO. 12.

The majority opinion has refused to discuss the error involved in the refusal to instruct the jury as requested in Defendant's Requested Instruction No. 12. The majority opinion bases its refusal upon several grounds, to-wit: (a) that the law embodied in the requested instruction was neither a fundamental nor basic proposition; (b) that no proper objection was made to such refusal pursuant to Rule 30 of the Federal Rules of Criminal Procedure, and (c) inferentially holds that the refusal to so instruct was not a plain error requiring consideration under Rule 52(b) of said rules.

We have already demonstrated that the requested instruction embodied a basic and fundamental rule of the law of conspiracy.

Rule 52b, Federal Rules of Criminal Procedure provides that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Here, the plain error in refusing to instruct as requested was brought to the attention of both the trial and Appellate Courts. The majority opinion states, however, that the objection made in the trial Court was "abortive" and did not go far enough to predicate an assignment of error thereon. Even if so, no technicality should be resorted to for the purpose of upholding a guilty verdict that is the result of the failure of the trial Court to give the jury appropriate judicial guidance. (Cf. *Bollenbach v. United States, supra,* and *Bihn v. United States,* 328 U.S. 633, 638.)

The very purpose of Rule 52b is plain. It was adopted so that no technicality or oversight or ignorance of counsel should prevent the reversal of a conviction where defendant has not been tried according to the forms and methods established by law.

The majority opinion justifies its refusal to consider the error complained of by quoting a fragment of this Court's decision in *Screws v. United States,* 325 U.S. 91, 107, as follows:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error." (R. 478.)

But, the majority opinion fails to quote the language of this Court following the foregoing and where this Court considered the error under Rule 52b:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

In *Tatum v. United States*, 19 F. 2d 612, 614, it is held that "Failure on the part of a trial court in a criminal case to 'instruct on all essential questions of law involved in the case, whether requested or not' would clearly 'affect substantial rights' within the meaning of Rule 52(b)."

See also:

United States v. Cumberland (3 Cir.) 200 F. 2d 609;

United States v. Sherman (2 Cir.) 200 F. 2d 880, 883.

In 1941 the Court of Appeals for the Ninth Circuit in *Sherwin et al. v. United States*, 112 F. 2d 503 and *Hemphill v. United States*, 112 F. 2d 505, refused to consider certain assignments of error on the ground they were insufficiently stated and preserved. On certiorari this Court remanded with instructions to the Appellate Court (312 U.S. 653) to consider "petitioner's assignment of error with respect to the argument of the Assistant United States Attorney without regard to any technical deficiency in its phraseology."

See *Wiborg v. United States*, 163 U.S. 632, 658-9; *Mahler v. Evy*, 264 U.S. 32, 45, and *Fisher v. United States*, 328 U.S. 463, where this Court in effect holds that any error affecting substantial rights must be considered under Rule 52(b).

The refusal of the trial judge to instruct on the law relative to the probative effect of hearsay testimony as to acts and declarations of a co-conspirator affected the substantial rights of petitioners. In *Fiswick v. United States,* 329 U.S. 211, 220, 91 L. ed. 197, 202, this Court held that the erroneous admission of hearsay testimony as to statements of co-conspirators affected the substantial rights of the defendant on trial. On a par is the refusal to instruct as to when such statements acquire any probative value.

For further argument on this point we refer to the dissenting opinion herein of Chief Judge Denman. (R. 481.)

The objection taken to the Court's refusal to give the requested instruction was sufficient to preserve the point. The objection (R. 460) pointed out the number of the requested instruction and that the substance thereof was "that the existence of the conspiracy charged so far as Morris Benatar was concerned and his connection therewith could not be established by the acts and declarations of any other alleged co-conspirator in the case."

The trial judge had heard the lengthy testimony of Furtado. It must be assumed that the judge had followed the course of the trial and knew that most of Furtado's testimony related acts and declarations of Potter. The objection taken was sufficient under the holdings in the cases of *New England Co. v. Bonner* (2 Cir.) 68 F. 2d 880, 881; *Cromwell v. Slaney* (1 Cir.) 65 F. 2d 940, 942; *Electrical Research Products v. Gross* (9 Cir.) 86 F. 2d 925, 930; each to the effect that objections are sufficient

where the ground therefor is so manifest that the trial Court cannot fail to understand it.

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4. CONTRARY TO THE DECISIONS OF THIS COURT, THE MAJORITY OF THE JUDGES JOINING IN THE AFFIRMING OPINION FIRST SPELLED GUILT OUT OF THE RECORD AND THEN UPHELD THE CONVICTIONS BY IGNORING ERRORS AFFECTING THE SUBSTANTIAL RIGHTS OF THE DEFENDANTS.

The functions of appellate judges have been defined and determined by this Court in the case of *Bollenbach v. United States,* 326 U.S. 607, 615, wherein it is stated that "it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance." In *Bihn v. United States,* 328 U.S. 633, 639, the rule is announced: "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government."

A mere reading of the majority opinion shows that the judges joining therein ignored the foregoing rules and first decided that the record (including the hearsay testimony of Furtado) established the guilt of petitioners and then proceeded to uphold the judgments; or, to paraphrase the language of this Court in the *Bihn* case, *supra,* at page 637:

> "So read, the opinion sounds more like comment of a zealous prosecutor rather than a decision by

judges who have special responsibilities for assuring fair trials of those accused of crime."

Reference to some of the language used in the majority opinion demonstrates that it was written in violation of the holdings in the foregoing cases.

The opening paragraph contains this statement: "these were the protagonists of the venal conspiracy involved in this appeal". (R. 462.)

Then follow the following statements:

"We shall see presently that this policy of delay soon crystalized into one of downright evasion, subterfuge, and falsification." (R. 465.)

"It was not long before Furtado and Benatars became 'as thick as thieves'." (R. 465.)

"We come next to 'the affair of the Backdated Letter'." (R. 466.)

"So the sordid tale was permitted to proceed." (R. 468.)

"Satan himself could not have provided a handier tool for Furtado's villainy." (R. 468.)

"But the Government was not taking a vacation. A month later, the blow fell, and Furtado's house of marked cards came tumbling about his ears." (R. 470.)

"Among the somewhat picayunish criticisms of appellee's brief interposed by appellants * * *" (R. 468.)

"Another example of appellant's microscopic criticism of the appellee's interpretation of the evidence in this case * * *." (R. 470.)

Neither judicial humor nor irony nor sarcasm should be permitted to take the place of a temperate consideration and determination of the question of whether a defendant has been convicted by a jury in a fair trial under proper judicial guidance and according to the forms and standards provided by law.

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5. THE OPINION IS IN ERROR IN HOLDING THAT THE TRIAL COURT DID NOT INVADE THE PROVINCE OF THE JURY.

The government had offered in evidence a statement made by Benatar to government officers long after the conspiracy charged had terminated.

The district judge, of his own motion, instructed the jury as follows:

> "Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements.
>
> In this regard I call your attention to one piece of evidence that has been admitted here which is limited entirely to the defendant Benatar, and that is the statement which is in evidence. Now, under any consideration of the evidence that statement was made

after the conspiracy had terminated, and I have at the time it was admitted, I specifically limited it to the defendant Benatar, and that is precisely what the language I have just read to you means. It means that statements such as that made after the conspiracy, statements made after the conspiracy is ended or declarations made after the conspiracy is ended can be considered against only the person making them and not other members of the conspiracy." (R. 453.)

The instruction unequivocally states to the jury that the Court admitted the extrajudicial statement given by Benatar to the Internal Revenue officers *because the conspiracy charged in the indictment had been established.*

Whether the conspiracy as charged ever existed and whether petitioners were members of that conspiracy were the basic issues in the case and the ultimate facts that the jury had to determine. By the foregoing instruction the Court told the jury that so far as the appellant Benatar was concerned the conspiracy had been established and that Benatar was a part and parcel thereof; that the reason the Court admitted Benatar's extrajudicial statement was because as to him the conspiracy not only had been established, but had terminated and therefore this statement made after the termination of the conspiracy was evidence against Benatar.

In *Bollenbach v. United States,* 326 U.S. 607; 90 L. ed. 350, this Court held that "a charge should not be misleading" (p. 614) and later states:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

The majority opinion upheld the giving of the foregoing Instruction on the grounds that the Instruction had to be read as a whole and that "no intelligent juror would have construed the Instruction in question as telling him that the existence of the conspiracy was to be taken as established". (R. 475.)

It is impossible to read the Instruction in its entirety without coming to the unalterable conclusion that the trial judge told the jury he had admitted the statement because the conspiracy had been established and had terminated.

The Instruction invaded the province of the jury and substituted the opinion of the trial judge for that of the jurors on the basic issue involved in the case. The opinion sanctions a procedure that is a departure from the usual and accepted course of judicial proceedings in the Federal Courts.

CONCLUSION.

Wherefore, petitioners pray that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully briefed and presented and justice done in the premises.

Dated, San Francisco, California,
April, 1954.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and counsel for the petitioners in the above entitled cause and that in my judgment the foregoing Petition is well founded in point of law as well as in fact and that said Petition is not interposed for delay.

Dated, San Francisco, California,
April, 1954.

LEO R. FRIEDMAN,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 667

MORRIS V. BENATAR AND BENATARS (A CORPORATION), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 462-481) and the dissenting opinion of Chief Judge Denman (R. 481-484) are reported at 209 F. 2d 734 and 746.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1954 (R. 485), and a petition for rehearing was denied February 3, 1954 (R. 485-486). On March 4, 1954, by order of Mr. Justice Douglas, the time for filing a petition for a writ of

certiorari was extended to April 3, 1954. (R. 486.) The petition was filed April 1, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court correctly refused to give an instruction, requested on behalf of petitioner Benatar, to the effect that the existence of the alleged conspiracy and Benatar's connection therewith could not be established by acts and declarations of alleged co-conspirators which took place out of Benatar's presence and were not authorized by him.

2. Whether the trial court's charge to the jury in effect told them that the alleged conspiracy had been established.

STATUTE AND RULES INVOLVED

18 U.S.C. 371. *Conspiracy to commit offense or to defraud the United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such con-

spiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On April 15, 1952, an indictment was filed in the United States District Court for the Northern District of California charging the two petitioners and Samuel W. Potter with conspiracy to obstruct and defeat the collection of withholding and unemployment taxes and the penalties and interest due thereon, in violation of 18 U.S.C. 371. Edwin M. Furtado, an employee in the office of the Collector of Internal Revenue, was named as a co-conspirator but not as a defendant,[1] and numerous overt acts were alleged. (R. 1-6.) After a jury trial lasting about two weeks all three defendants were found guilty as charged. (R. 11.) Petitioner Morris V. Benatar was sentenced to imprisonment for a year and a day; the corporation was fined $10,000; Potter was fined $2,500. (R. 13-16; 464.) Potter did not appeal. The Court of Appeals affirmed the convictions of Morris V. Benatar and the corporation. (R. 485.)

The Evidence.—Petitioner Benatar's, Inc., operated several retail drug stores in San Francisco and Sacramento. (R. 222, 405; Pet. 4.) Petitioner Morris V. Benatar was president of the corporation and owner of most of its stock; his wife was vice-president; her sister-in-law, Rose Batlin, was a bookkeeper; Philip Batlin was secretary and general manager; the co-defendant, Samuel W. Potter,

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[1] Furtado had already pleaded guilty to charges of destroying, and making false entries in, official records. He had been sentenced to ten years' imprisonment and was serving the sentence at the time of the present trial. (R. 269, 424-430.)

was office manager. (R. 100, 102, 105, 137-141, 397; Pet. 4.)

In April, 1947, the Treasury Department made demand upon the corporation for penalties and interest resulting from late filing of the 1946 unemployment tax return. In May, 1947, the corporation filed a claim for abatement of the penalties on the ground that an extension of time to file the 1946 return had been duly requested by telephone. Mrs. Benatar signed the claim under oath. (R. 257-261, 280-281.)

In August 1948 a further demand for the same penalty was served upon the corporation. Either Potter or petitioner Benatar asked Moonie, a certified public accountant, to look into the matter. Moonie knew that Furtado, Chief of the Accounts Section of the Wage and Excise Tax Division of the Collector's Office, was responsible for such collections and he brought Furtado to the main office of the corporation and introduced him to Potter and later to petitioner Benatar. (R. 261-273.)

Furtado knew that the penalty could be abated if a request for an extension of time to make the 1946 return had been filed with the Collector's office before January 30, 1947. At Furtado's suggestion a letter was prepared on the corporation's stationery asking such an extension on the ground of illness in the office. The letter was signed by Potter; it was back-dated January 28, 1947; and it was given to Furtado and placed in the corporation's file in the Collector's office by him in September, 1948. Furtado then prepared a claim for

abatement of the penalty on the ground that a timely request had been made for an extension of time to file the return. A copy of the back-dated letter was attached; the claim was signed and sworn to by petitioner Benatar as president; and it was mailed to the Collector in November 1948. (R. 273-279, 367-368.)

Thereafter, during 1949, 1950, and the first part of 1951, Furtado manipulated the records in the Collector's office to make it appear that the corporation's quarterly payments of withholding and unemployment taxes had been received on time. Actually, the corporation either did not send in the checks until several months after they were due, or Furtado held them on his desk until he was notified by Potter that the corporation had sufficient funds in the bank to cover the payment. (R. 281-342.) The corporation thus avoided the payment of considerable sums in interest and penalties. (R. 384-385.) For example, the returns and taxes for the quarter ending March 31, 1949, were due on April 30. When the returns were received in the Collector's office on May 2, without a remittance, Furtado marked them paid as of April 28. In August Potter gave him a corporation check, dated April 30, for the amount of the taxes but without penalty or interest, and Furtado put the check through to clear the books. (R. 282-293.) Again, Furtado received the corporation's check for the quarter ending June 30, 1949, but held it on his desk until Potter notified him in November that the corporation had sufficient funds in the bank. (R. 293-298.)

Petitioner Benatar signed the majority of the returns himself. (R. 137-141.) The tardy tax checks were always back-dated to make it appear that they were timely, but the corporation's records revealed that they had been issued on a date much later than that appearing on their faces. (R. 105-156 *passim.*) Petitioner Benatar decided when these checks were to be sent out (R. 399) and signed many of them himself (R. 105, 124, 125, 128, 132, 154). Schmidts, the accountant-auditor, prepared a daily bank report for Benatar which showed the dates on which the tax checks were actually issued, and also revealed how long those being held on Furtado's desk were outstanding. (R. 115-117, 119, 123-124, 156-157, 188-195, 198-203.)

The daily bank report prepared for Benatar showed one particular tax check for $14,335.29 outstanding from February 27, 1951, to August 1, 1951. (R. 131, 156-159.) Furtado, who had held this check on his desk from the time it was received in the Collector's office early in March, discovered in April that the Calo Dog Food Company had paid a similar tax in almost the same amount. He destroyed the Calo Dog Food Company records on the payment, altered the books so as to credit the amount to the petitioner corporation, and returned the corporation's check to Potter with the comment that he would probably never have to pay the tax. In August, when Treasury supervisors began to look into the files, Furtado had petitioner Benatar send in a new check with a letter which implied that the original check must have been lost by the Treasury. He told Benatar that the records were

in such a condition that the corporation would probably get a refund of the full amount. Benatar said that he would give Furtado two-thirds of the amount if that happened. The original check, which had been returned by Furtado in April and apparently destroyed, was continued on the daily bank report until August 1 at Benatar's instructions. (R. 130-131, 153, 159-160, 210-211, 314-338.) [2]

Furtado visited the main office of the corporation almost every day during 1951. (R. 161.) The corporation cashed a number of large checks for him without requiring his endorsement, and this procedure was approved by petitioner Benatar. (Govt. Ex. 54, pp. 14, 36.) [3] These checks had been delivered to the Collector's office in payment of taxes and Furtado appropriated the proceeds to himself. (R. 161-163, 233, 342-347, 353.) Furtado purchased numerous articles of merchandise from the corporation on which he was allowed a credit in the amount of the interest he had saved the corporation. (R. 347-348.)

Petitioner Benatar did not take the stand and very little evidence was presented by the defense. (R. 418-434.)

The Instructions.—At the outset of the testimony the trial court, at the request of the defense,

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[2] For other evidence as to this transaction see R. 130-133, 153-160, 360-367, 375-376.

[3] Government's Exhibit 54 had not been reproduced in the printed record (R. 393-394) but the original exhibit has been filed with the Clerk of this Court. It is a sworn statement of petitioner Benatar given during the investigation of Furtado's manipulations.

instructed the jury that certain exhibits were being admitted in evidence only against the corporation. (R. 31-49 *passim*, 83, 85.) Later, when exhibits were introduced which had been linked by independent evidence to all three defendants, the court told the jury that they could be considered as to all defendants. (R. 107-109.)[4] At the same time the court remarked, "* * * certainly until the conspiracy is established, any acts or declarations of one person [are] not binding on the other * * *" (R. 108), and the jury were frequently admonished thereafter that the court did not mean to imply by its rulings on admission of evidence that a conspiracy *did* exist and that that was a question for them to decide (R. 109, 259, 319, 321, 382). One conversation between Schmidts and Potter which implicated petitioner Benatar was excluded as to the latter. (R. 157-159.) At the conclusion of the Government's case the court granted the Government's motion to admit all exhibits as to all the defendants,[5] but again warned that the question of the existence of a conspiracy was left to the jury. (R. 405-406.)

The trial judge refused to give the following instruction requested in behalf of petitioner Benatar (R. 8-9):

> In determining whether or not a conspiracy existed as charged in the indictment and that

[4] See also R. 120, 124, 142-143, 178-179, 181-182, 243-244, 305, 307, 350-351.

[5] With the exception of petitioner Benatar's statement (Govt. Ex. 54) which was admitted only as to him (R. 398-399, 453-454).

the defendant Morris Benatar was a member of such conspiracy, you are instructed that you cannot take into consideration and must disregard and put out of your mind any and all testimony and evidence relating to any acts done or declarations made by any other alleged co-conspirator out of the presence of the defendant Morris Benatar and which acts or declarations were not authorized by Morris Benatar. In other words, so far as the defendant Morris Benatar is concerned, the existence of the conspiracy charged in the indictment and his connection therewith as a member must be established by evidence independent of the acts and declarations of any other alleged co-conspirator done or made out of the presence of Morris Benatar and which were not authorized by the said Morris Benatar.

A considerable portion of the court's long and careful charge (R. 436-459) was devoted to an explanation of the elements of the offense of conspiracy (R. 451-457). The jury were told that, as to each defendant, the question of guilt or innocence must be determined independently of the guilt of the others. (R. 444.) As to the existence of a conspiracy, the jury were told that this could be established by the circumstantial evidence afforded by the acts of the alleged conspirators. (R. 451-452, 454.) As to the actual participation of the individual defendants, they were instructed as follows (R. 452-453):

The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts charged in the Indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object.

* * * * *

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them.

Objection was made to the refusal of petitioner Benatar's requested instruction, counsel stating the substance of the instruction but giving no grounds for his objection. (R. 460.)

ARGUMENT

1. The substance of the rejected instruction, requested on behalf of petitioner Benatar, was that neither the existence of a conspiracy nor Benatar's connection therewith could be established by evidence of acts and declarations of the other alleged conspirators, which acts and declarations did not occur in Benatar's presence or were not authorized by him. The Court of Appeals held that defense counsel had failed to preserve the point in the trial court since he stated no grounds for his objection to the omission of the requested instruction; that he should have pointed out testimony as to acts and declarations of the other conspirators, out of Benatar's presence, which implicated him; that the instruction was unnecessary unless related to the particular facts at bar; and that, even if the omission of the instruction was error, an examination of the record affirmatively revealed that it could not have been prejudicial. (R. 476-479.) [6]

Petitioner Benatar contends here that the acts and declarations of the other conspirators, Potter and Furtado, were not admissible to establish

[6] The core of the dissent is found in this statement: "It [the need for the disputed instruction] consists of evidence, inadmissible as to Benatar, of *over 100 pages of the record*, required to be summarized in over 7 pages of the opinion, of *hearsay statements of other co-conspirators concerning Benatar's participancy in the conspiracy.*" (R. 482.) If this were an accurate statement of the contents of the record, there is no doubt that the instructions requested should have been given. However, as we point out below, in the single instance where hearsay statements might have connected Benatar with the conspiracy the court's instructions clearly excluded the evidence from being used to that end.

either the conspiracy or Benatar's connection therewith (Pet. 22-24); that the rejected instruction is fundamental in a conspiracy case (Pet. 24-27); and that the refusal to so instruct the jury in this case constituted plain error (Pet. 27-33). We submit that the petition for certiorari confuses the rules governing proof of the existence of a conspiracy with those governing proof of the participation of the individual conspirators; that the requested instruction was erroneous; and that there were no fundamental omissions in the trial court's charge as it was given to the jury. A contention similar to that raised by petitioner Benatar was rejected without comment in *Blumenthal* v. *United States,* 332 U.S. 539, 560.

The existence of *a conspiracy,* as alleged in the indictment, may be inferred from circumstantial evidence. *Glasser* v. *United States,* 315 U.S. 60, 80; *Direct Sales Co.* v. *United States,* 319 U.S. 703, 714. Any relevant evidence, including the acts of the defendants (other than evidence such as admissions usable against one party alone), may properly be considered by the jury in determining the existence of an underlying purpose or plan. The Court of Appeals for the Seventh Circuit has thus expressed the well-established rule in *United States* v. *Holt,* 108 F. 2d 365, 368-369, certiorari denied, 309 U. S. 672:

> True it is, that if the evidence is as consistent with the innocence of the appellant as with his guilt, no conviction can be had. It is equally true that overt acts of the parties may

> be considered with other evidence and attending circumstances in determining whether a conspiracy exists, and where the overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such pre-existing conspiracy, so that when proven they may be considered as evidence of the conspiracy charged. * * *

See also *American Tobacco Co.* v. *United States,* 328 U. S. 781, 789; *McDonald* v. *United States,* 133 F. 2d 23, 24 (C.A. D.C.); *Rich* v. *United States,* 62 F. 2d 638, 640 (C.A. 1st), certiorari denied, 289 U. S. 735; *Pastrano* v. *United States,* 127 F. 2d 43, 44 (C.A. 4th); *Davidson* v. *United States,* 274 Fed. 285, 287 (C.A. 6th); *Safarik* v. *United States,* 62 F. 2d 892, 896 (C.A. 8th); *Marx* v. *United States,* 86 F. 2d 245, 250 (C.A. 8th); *Garhart* v. *United States,* 157 F. 2d 777, 781 (C.A. 10th). Proving a conspiracy by the acts of the defendants is not proving a conspiracy by hearsay, for the acts testified to by the various witnesses are facts proved in the same manner as any other facts.

Once the jury has found from all the relevant evidence, including the overt acts of the parties, that a conspiracy exists, it must then determine whether the particular defendant was or was not a member of it. This brings into play the rule of the cases upon which petitioner Benatar now relies, i.e., that participation of one conspirator can not be proved by the acts and declarations of a second conspirator, out of the presence of the first. But these

cases, one and all, involved extrajudicial declarations of the second conspirator *which implicated the first,* and which, therefore, constituted hearsay as to him.[7] *Krulewitch* v. *United States,* 336 U.S. 440, 442-443; *Glasser* v. *United States, supra,* pp. 73-75; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 249-250; *Winchester & Partridge Mfg. Co.* v. *Creary,* 116 U.S. 161; *Briggs* v. *United States,* 176 F. 2d 317 (C.A. 10th); *Bartlett* v. *United States,* 166 F. 2d 920 (C.A. 10th); *Braatelien* v. *United States,* 147 F. 2d 888, 893 (C.A. 8th); *Minker* v. *United States,* 85 F. 2d 425 (C.A. 3d); *United States* v. *Renda,* 56 F. 2d 601 (C.A. 2d).

Clearly the requested instruction was erroneous, for it limited proof of the existence of the conspiracy to such acts as the defendants performed in each other's presence or authorized each other to perform. Such a limitation upon the use of circumstantial evidence would, of course, make it well-nigh impossible to prove most conspiracies.

Moreover, even if the instruction requested had been the correct one, namely, that, in determining the issue of Benatar's participation, the jury should disregard extrajudicial declarations of Potter and Furtado which implicated Benatar but were not made in his presence, then there was no basis in the record for that instruction. The Court of Appeals pointed out that no evidence neces-

[7] Of course, when the jury has found that there was a conspiracy, and that certain defendants participated, it may impute to each conspirator the acts and declarations of all others in furtherance of the conspiracy. *Pinkerton* v. *United States,* 328 U.S. 640.

sitating such an instruction was called to the attention of the trial court or referred to on the appeal. (R. 477-478.) Examination of the record reveals only one instance, to which we have already referred (*supra,* p. 9), in which Schmidts testified that Potter told him that Benatar had given certain instructions. (R. 157-159.) The court at that time instructed the jury that this evidence could not be considered as to Benatar (R. 158), and this specific ruling was not thereafter countermanded except by the general charge to the effect that, after the conspiracy had been proved, the acts of one conspirator in furtherance of the plan were the acts of all. (*Supra,* p. 11.)

The participation of petitioner Benatar was not proved by extrajudicial hearsay acts and declarations implicating him. It was proved by direct evidence that he was the dominant figure in the corporation; that he signed the improper claim for abatement of the 1946 penalty; that he signed many of the tax returns; that he controlled the issuance of the tardy, back-dated tax checks; that he was aware how long these checks remained outstanding; and that he cooperated in Furtado's attempt to give the corporation credit for the Calo Dog Food Company tax payment. (*Supra,* pp. 6-8.) We submit that no essential instruction required by the facts of this case was omitted from the trial court's charge to the jury.

2. It is urged (Pet. 33-35) that the trial judge unequivocally told the jury that the conspiracy had been established, in instructing them on the use

to be made of the statement given by Benatar to the revenue agents (Govt. Ex. 54) during the investigation. The argument is without merit. The instruction, when read as a whole, clearly left the issue of the existence of a conspiracy to the jury. (See, *e.g.*, R. 444, 451-453, 454-455; and see *supra*, pp. 9-11.) The questioned passage (R. 453-454) simply told the jury that Benatar's statement could only be considered as evidence against him, since, even if there was a conspiracy, it had terminated prior to the time the statement was given.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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